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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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|-----------------|-------------|----------------------|---------------------|------------------|

10/649,691

08/28/2003

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07/25/2008

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EXAMINER

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ART UNIT

PAPER NUMBER

3781

MAIL DATE

DELIVERY MODE

07/25/2008

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID MANIACI

Appeal 2008-0329
Application 10/649,691
Technology Center 3700

Decided: July 25, 2008

Before DONALD E. ADAMS, ERIC GRIMES, and
MELANIE L. McCOLLUM, *Administrative Patent Judges*.

McCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a cupholding plate. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part, reverse-in-part, and enter a new ground of rejection.

INTRODUCTION

Claims 1-6 are pending and on appeal (App. Br. 2). The Examiner rejects claims 1-6 under 35 U.S.C. § 103(a) (Ans. 3-7).

Claims 1-3 and 5 read as follows:

1. A cupholding plate comprising:
 - a plate support surface having a peripheral edge;
 - a stiffened, circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surfaces [sic];
 - an upwardly curving peripheral rim connecting between said plate support surface and said outer flange;
 - a pair of partition elements connect at a centerpoint of said plate support surface and radiating out to said outer flange, each partition element having a flat upper apex connecting to said circular outer flange at the flanges [sic] elevation, and transitions smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim;
 - said partition elements forming an obtuse angle at said centerpoint at a base of said partition sidewall such that a first large compartment is formed between the partition elements and the outer flange;
 - a cup retaining orifice formed within said plate support surface and positioned such as to intersect at the outer circumference of the outer flange rim;
 - a stiffened cup support rim circumscribing said cup retaining orifice;
 - a third partition element connecting said cup support rim with said flat upper apex of said other partition elements, said third partition element having a flat upper apex that transitions smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim; and
 - a stiffened cup support rim contained within the outer circumference of the plate is a cup retaining orifice and wherein said cup support rim intersects with said peripheral rim at said plate peripheral edge, such that both said peripheral rim and said cup support rim are superimposed about each other along a small arc along their respective circumferences.

2. The cupholding plate of Claim 1, wherein said cupholding* plate is formed of a single structural element that is formed of a material selected from the group comprising foam, paper, pressed paper, and plastic.

3. A cupholding plate comprising:
a plate support surface having a peripheral edge;
a stiffened, circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surfaces [sic];
an upwardly curving peripheral rim connecting between said plate support surface and said outer flange;
a single partition elements [sic] bisecting said plate support surface through a centerpoint of said plate support surface between said outer flange, said partition element having a flat upper apex connecting to said circular outer flange at the flanges [sic] elevation, and transitions smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim;
a cup retaining orifice formed within said plate support surface and positioned such as to intersect at the outer circumference of the outer flange rim;
a stiffened cup support rim circumscribing said cup retaining orifice;
a stiffened cup support rim contained within the outer circumference of the plate is a cup retaining orifice and wherein said cup support rim intersects with said peripheral rim at said plate peripheral edge, such that both said peripheral rim and said cup support rim are superimposed about each other along a small arc along their respective circumferences.

5. A cupholding plate comprising:
a plate support surface having a peripheral edge;
a stiffened, circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surfaces [sic];
an upwardly curving peripheral rim connecting between said plate support surface and said outer flange;

* The Claims Appendix included with the Appeal Brief incorrectly states “cubholding” rather than “cupholding.”

a cup retaining orifice formed within said plate support surface and positioned such as to intersect at the outer circumference of the outer flange rim;

a stiffened cup support rim circumscribing said cup retaining orifice;

a stiffened cup support rim contained within the outer circumference of the plate is a cup retaining orifice and wherein said cup support rim intersects with said peripheral rim at said plate peripheral edge, such that both said peripheral rim and said cup support rim are superimposed about each other along a small arc along their respective circumferences.

Claims 1, 3, and 5 are each directed to a plate containing a cup retaining orifice formed within a plate support surface and a stiffened cup support rim circumscribing the cup retaining orifice. Claim 1 additionally requires that the plate includes a pair of partition elements forming an obtuse angle at a centerpoint of the plate support surface. Claim 3 additionally requires that the plate includes a single partition element bisecting the plate support surface.

Claim 2 depends from claim 1 and requires that the plate is formed of a material selected from a group comprising plastic. Claims 4 and 6 correspond to claim 2 except that they depend from claims 3 and 5, respectively.

OBVIOUSNESS – MANN, CANER, AND PERLIS

Claims 1 and 2 stand rejected under 35 U.S.C. § 103(a) as obvious over Mann (US Des. 351,316, Oct. 11, 1994) in view of Caner (US Des. 242,106, Nov. 2, 1976) and Perlis (US 5,803,305, Sep. 8, 1998).

The Examiner relies on Mann for disclosing a plate having most of the features of claim 1 (Ans. 3-4 & 8). In particular, the Examiner relies on Mann for disclosing a “cup retaining orifice formed within [a] plate support

surface” (*id.* at 3). The Examiner argues that “the opening in the top of the cupholding section of Mann that allows entry of the cup would constitute a cup-retaining orifice” (*id.* at 11).

The Examiner relies on Caner for teaching “a compartmented plate having partition elements transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim” (*id.* at 4). The Examiner finds that “[h]aving smooth transitions to the elevation of the plate support surface provides radii, thereby significantly reducing stress concentrations” (*id.*). The Examiner concludes that it would have been obvious “to add smooth transitions from the partition elements to the plate support surface of Mann as taught by Caner . . . so as to significantly reduce stress concentrations” (*id.*).

The Examiner relies on Perlis for teaching “a cup holding plate having a stiffened cup support rim, . . . wherein the substantially flat, outwardly extending cup holder rim provides flexural strength” (*id.*). The Examiner concludes that it would have been obvious to add to Mann’s plate “a stiffened cup support rim as taught by Per[li]s . . . to provide additional flexural strength” (*id.*).

Appellant contends that “[n]one of the cited reference[s] teach a cup holding area where the bottom area is open” (App. Br. 11).

Findings of Fact

1. Claim 1 requires a cupholding plate comprising a plate support surface, a rim circumscribing the plate support surface at an elevation above

the plate support surface, and a cup retaining orifice formed within the plate support surface.

2. Mann describes a cocktail plate having a circular compartment (Mann, Figs. 1, 3, & 4).

3. The Examiner identifies this circular compartment as a “cup retaining orifice” (Ans. 8).

4. The Examiner identifies the food-bearing surface of Mann’s plate as a “plate support surface” (*id.*).

5. Mann’s circular compartment does not have an opening within this “plate support surface” (Mann, Fig. 1, 3, & 4). In particular, the opening in the top of Mann’s circular compartment is at the elevation of the rim circumscribing the plate support surface and is therefore not within the plate support surface (*id.* at Figs. 1 & 2).

6. The Examiner does not rely on either Caner or Perlis for teaching a cup retaining orifice formed within a plate support surface (Ans. 4).

Analysis

We agree with Appellant that the Examiner has not set forth a prima facie case that claim 1 would have been obvious. The Examiner argues that “the opening in the top of the cupholding section of Mann that allows entry of the cup would constitute a cup-retaining orifice” (Ans. 11). However, the opening at the top of Mann’s circular compartment is not an “orifice formed within the plate support surface” (Finding of Fact (FF) 5). Thus, we agree that the Examiner has not set forth a prima facie case that Mann describes a cup retaining orifice formed within the plate support surface. In addition,

the Examiner does not rely on Caner or Perlis to overcome this deficiency (FF 6). We therefore reverse the rejection under 35 U.S.C. § 103(a) of claim 1 and of claim 2, which depends from claim 1.

OBVIOUSNESS – BRUNDAGE, CANER, AND PERLIS

Claims 3 and 4 stand rejected under 35 U.S.C. § 103(a) as obvious over Brundage (US 3,955,672, May 11, 1976) in view of Caner and Perlis. The Examiner relies on Brundage for disclosing a plate having most of the features of claim 3 (Ans. 5). The Examiner relies on Caner and Perlis for the reasons discussed above with regard to claim 1 (*id.* at 6). The Examiner also relies on Perlis for teaching “constructing the container of plastic” (*id.*).

Appellant contends that the Examiner erred in concluding that claims 3 and 4 would have been obvious over Brundage, Caner, and Perlis.

Findings of Fact

7. Brundage describes “a plate assembly comprising generally a body **10** and an integrally formed cup support member **12**. The body is provided with a food-bearing surface **14** . . . and a rim **17**. A transverse upstanding ridge **18** is formed in body **10** and serves to divide the food-bearing surface of the plate assembly into a plurality of separate compartments **19**.” (Brundage, col. 2, ll. 17-25.)

8. Brundage’s cup support member forms an orifice that “functions to receive and support a glass or can of liquid” (*id.* at Figs. 1-3 and col. 1, ll. 57-59).

9. Brundage’s “cup support member **12** is comprised of column **22** and lip **24**. Lip **24** is integrally formed with rim **17** and ridge **18**.” (*Id.* at col. 2, ll. 34-36.)

10. Brundage's food-bearing surface 14 has a peripheral edge (*id.* at Fig. 1).

11. Brundage depicts an upwardly curving peripheral rim connecting between the food-bearing surface 14 and the rim 17 (*id.* at Fig. 2).

12. Brundage describes using plastic to make the plate (*id.* at col. 3, ll. 7-8).

13. Caner depicts a compartmented plate having an upwardly curving peripheral rim connecting between a food-bearing surface and an outer rim (Caner, Figs. 2, 3, & 5).

14. Caner also depicts a partition element having a flat upper apex that transitions smoothly to the elevation of the food-bearing surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim (*id.* at Figs. 1-5).

15. Perlis describes a combined plate and cup holder (Perlis, Abstract).

16. Perlis describes forming the plate from "inexpensive rigid or semi-rigid material, such as . . . a plastic material . . . , making the plate disposable." Perlis also states that "a reusable plate may be constructed of a higher grade plastic material . . . or other rigid material." (*Id.* at col. 5, 10-17.)

17. In addition, Perlis describes including a stiffened cup support rim circumscribing the cup holding compartment (*id.* at Fig. 4 & col. 5, ll. 10-17).

Analysis

Brundage describes a plate having most of the features of claim 3 (FF 7-11). In particular, Brundage describes a plate having a plate support surface (14), a partition element (18) bisecting the plate support surface, and a cup retaining orifice formed within the plate support surface (FF 7-8).

Caner describes a partition element having a flat upper apex that transitions smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly curving peripheral rim (FF 14). We agree with the Examiner that it would have been obvious to provide Brundage's plate with smooth transitions from the apex of the partition element to the plate support surface, as described in Caner.

Perlis describes a stiffened cup support rim circumscribing the cup holding compartment (FF 17) and forming the plate from plastic (FF 16). We agree with the Examiner that it would have been obvious to include Perlis's stiffened cup support rim in Brundage's plate and to form the plate from plastic.

Appellant argues, however, that "the examiner states that Brundage does not teach smooth transition between partition and plate support. This seems to go against the assertion that Brundage teaches '[a]n upwardly curving peripheral rim connection between said plate support surface and said outer flange.'" (App. Br. 11-12.)

We are not persuaded by this argument. The Examiner states that "Brundage fails to teach the *partition element* transitioning smoothly to the elevation of the plate support surface by a curving partition sidewall having

a similar curvature with the upwardly curving peripheral rim” and therefore relies on Caner to teach this feature (Ans. 6 (emphasis added)). However, we do not agree that this statement goes against the Examiner’s assertion that Brundage teaches an “upwardly curving *peripheral rim* connecting between said plate support surface and said outer flange” (*id.* at 5 (emphasis added)). The Examiner is referring to two different claim features.

Appellant also argues that “the examiner does not cite a figure for ‘[a] plate support surface having a peripheral edge’” (App. Br. 12). We are not persuaded by this argument. The Examiner clearly identifies Brundage’s food-bearing surface 14 as the plate support surface (Ans. 10). Food-bearing surface 14 has a peripheral edge (FF 10).

With respect to claim 4, Appellant additionally argues that “[t]wo references are made in [Perlis] of plastic. The first specifically states the plastic must be able to be thrown away. The second states that it is made of a higher grade plastic not to be thrown away. This may not encompass all plastics, allowing for claiming of a specific type of plastic.” (App. Br. 11.) In addition, Appellant argues that “it seems unobvious to combine two inventions that are made of two different plastics with clearly different purposes” (Reply Br. 3).

We are not persuaded by these arguments. First, claim 4 does not claim a specific type of plastic. Second, the Examiner does not argue that it would have been obvious to combine the two types of plastic described in Perlis to form a plate. Instead, the Examiner relies on Perlis to teach the use of plastic generally, as recited in claim 4 (Ans. 6 & 13).

In addition, Appellant argues that “[t]here is no suggestion as to the desirability of any modification of the references to describe the present invention” (App. Br. 13). In particular, Appellant argues that “there must be a reason or suggestion in the art for selecting the design” (*id.*).

We are not persuaded by this argument. “[A]ny need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007). The Examiner finds that it would have been obvious “to add smooth transitions from the partition elements to the plate support surface of Brundage as taught by Caner . . . so as to significantly reduce stress concentrations” (Ans. 6). The Examiner also finds that it would have been obvious to include “a stiffened cup support rim as taught by Perlis . . . to provide additional flexural strength” (*id.*). Appellant has not shown that these findings are incorrect.

We conclude that the Examiner has set forth a prima facie case that claims 3 and 4 would have been obvious over Brundage in view of Caner and Perlis, which Appellant has not rebutted. We therefore affirm the rejection of claims 3 and 4 under 35 U.S.C. § 103(a).

OBVIOUSNESS – BRUNDAGE AND PERLIS

Claims 5 and 6 stand rejected under 35 U.S.C. § 103(a) as obvious over Brundage in view of Perlis. The Examiner relies on Brundage for disclosing a plate having most of the features of claim 5 (Ans. 7). The Examiner relies on Perlis for the reasons discussed above with regard to claims 1 and 3 (*id.*).

Appellant contends that the Examiner erred in concluding that claims 5 and 6 would have been obvious over Brundage and Perlis.

Analysis

Brundage describes a plate having most of the features of claim 5 (FF 7-11). In particular, Brundage describes a plate having a plate support surface (14) and a cup retaining orifice formed within the plate support surface (FF 7-8).

Perlis describes a stiffened cup support rim circumscribing the cup holding compartment (FF 17) and forming the plate from plastic (FF 16). We agree with the Examiner that it would have been obvious to include Perlis's stiffened cup support rim in Brundage's plate and to form the plate from plastic.

Appellant traverses the rejection of these claims for substantially the same reasons as the rejection of claims 3 and 4 (App. Br. 12). We are unpersuaded by these arguments for the reasons discussed above.

We conclude that the Examiner has set forth a prima facie case that claims 5 and 6 would have been obvious over Brundage in view of Perlis, which Appellant has not rebutted. We therefore affirm the rejection of claims 5 and 6 under 35 U.S.C. § 103(a).

NEW REJECTION

Under the provisions of 37 C.F.R. § 41.50(b), we enter the following new ground of rejection: claims 1 and 2 are rejected under 35 U.S.C. § 103(a) as obvious over Mann in view of Caner, Brundage, and Perlis.

Mann describes a plate comprising:

a plate support surface having a peripheral edge;

a stiffened, circular outer flange rim circumscribing the entire plate support surface at an elevation above the plate support surface;

an upwardly curving peripheral rim connecting between the plate support surface and the outer flange;

a pair of partition elements connecting at a centerpoint of the plate support surface and radiating out to the outer flange, each partition element having a flat upper apex connecting to the circular outer flange at the flange elevation, the partition elements forming an obtuse angle at the centerpoint at a base of the partition sidewall such that a first large compartment is formed between the partition elements and the outer flange;

a circular compartment formed within the plate support surface and positioned such as to intersect at the outer circumference of the outer flange rim;

a circular compartment rim circumscribing the circular compartment;
and

a third partition element connecting the circular compartment rim with the flat upper apex of the other partition elements, the third partition element having a flat upper apex;

wherein the circular compartment rim intersects with the peripheral rim at the plate peripheral edge, such that both the peripheral rim and the circular compartment rim are superimposed about each other along a small arc along their respective circumferences (Mann, Figs. 1-4; *see* Ans. 8).

Caner describes a partition element having a flat upper apex that transitions smoothly to the elevation of the plate support surface by a curving partition sidewall having a similar curvature with the upwardly

curving peripheral rim (FF 14). We find that it would have been obvious to provide Mann's plate with smooth transitions from the apex of the partition elements to the plate support surface, as described in Caner, for the reasons indicated by the Examiner in rejecting claim 1.

Brundage describes "a plate assembly comprising generally a body **10** and an integrally formed cup support member **12**" (FF 7). Brundage's cup support member forms an orifice that "functions to receive and support a glass or can of liquid" (FF 8). Brundage also teaches that the plate is made of plastic (FF 12). We find that it would have been obvious to include a cup support member forming an orifice, as described in Brundage, in place of Mann's circular compartment "to receive and support a glass or can of liquid." We also find that it would have been obvious to form the plate of plastic, as described in Brundage.

Perlis describes a stiffened cup support rim circumscribing the cup holding compartment (FF 16-17). Assuming that Brundage's cup support member is not inherently stiffened, we find that it would have been obvious to form the cup support member from a stiffened material, as described in Perlis, to provide additional support for the glass or can of liquid.

In traversing the rejection of claims 1 and 2 over Mann, Caner, and Perlis, Appellant argues that "Mann does not seem to disclose the specific connection at the center point as disclosed in this claim. The curvature of the pieces seem[s] different [than] what is disclosed in this invention. There is specific curvature in the cited reference that does not seem to teach the angular requirements of this claim." (App. Br. 11.) In addition, Appellant argues that Mann's "Fig. 4 shows that the lower left portion does not form

an angle at the centerpoint. It terminates past the centerpoint, to the right. Additionally, [i]t does not terminate at the center, but toward the upper-right.” (Reply Br. 2.)

We are not persuaded by these arguments. As noted by the Examiner, “Mann teaches the pair of partition elements forming an obtuse angle at a center point, as shown in both Fig. 3 and Fig. 4 in the upper portion of the figures. This meets the limitations of the claims.” (Ans. 11.) In addition, we are not relying on Mann for teaching the curvature of the partition sidewalls. Instead, we are relying on Caner for this limitation.

CONCLUSION

We affirm the rejections of claims 3-6 under 35 U.S.C. § 103(a). We reverse the rejection of claims 1 and 2 under 35 U.S.C. § 103(a) over Mann in view of Caner and Perlis, but set forth a new ground of rejection of these claims under 35 U.S.C. § 103(a) over Mann in view of Caner, Brundage, and Perlis.

TIME PERIOD FOR RESPONSE

Regarding the affirmed rejections, 37 C.F.R. § 41.52(a)(1) provides that “Appellant may file a single request for rehearing within two months from the date of the original decision of the Board.”

In addition to affirming the Examiner’s rejections of one or more claims, this decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides: “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should Appellant elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejections, the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellant elects prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejections, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART, 37 C.F.R. § 41.50(b)

Appeal 2008-0329
Application 10/649,691

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